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725-735—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 787

FOREST BRITT PETER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 324 F. 2d 173.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1963. A petition for rehearing was denied on December 10, 1963. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 24, 1963, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision in Section 6(j) of the Universal Military Training and Service Act which makes belief in a Supreme Being a condition for qualification as a conscientious objector violates the First and Fifth Amendments to the United States Constitution.

2. Whether petitioner qualifies as a conscientious objector under Section 6(j).

STATUTE INVOLVED

Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), provides, in pertinent part:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of California, sitting without a jury, of failure to submit to induction into the armed forces and was sentenced to six months' imprisonment.

Petitioner initially registered for the selective service system on July 10, 1956 (R. 2).[1] On May 29, 1957, while he was a student at Reed College, he filed the standard classification questionnaire with his local board (R. 5). With the questionnaire petitioner submitted a portion of a poem expressing opposition to war and stated that he agreed with the poem's sentiments, but he did not claim exemption as a conscientious objector (R. 16).

In February 1958, petitioner withdrew from Reed College and took up residence in San Francisco, California (R. 43, 44). In March 1958, petitioner filed the conscientious objector form and requested classification as a conscientious objector (R. 17, 18). In answer to the question, "Do you believe in a Supreme Being," petitioner wrote, "It depends on the definition" (R. 18). He appended the following explanation (R 20):

> Since human life is for me a final value, I consider it a violation of moral law to take human life. I think I have reached this conviction out of my reading of such writings as those of Blake (christian mystic), Emerson, Whitman, and more modern poets who have touched on the question.
>
> I consider this belief to be superior to my obligation to the state.
>
> In so far as this conviction is religious, it has been best described by Rev. John Haynes Holmes as follows: "Religion is the conscious-

[1] "R." refers to petitioner's selective service file, which comprises the bulk of the record. "Tr." refers to the transcript of petitioner's trial, which is also part of the record.

> ness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands * * * (it) is the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best."

Petitioner further stated (R. 20):

> I would say that the source of my conviction concerning the sacredness of human life and the human spirit has been my experience and study in our democratic american culture, with its values derived from the western religious and philosophical tradition. As I have indicated above, I feel that I have learned of the values of this tradition through personal reading and meditation rather than through experience in any organized groups.
>
> The use of violence (physical force) comprises the ends one seeks in action. I consider war to be the greatest example of this. The use of non-violence in the freeing of India and the Montgomery bus strike is an example of the kind of force I do believe in.

The local board rejected petitioner's application for classification as a conscientious objector and classified him 1–A (R. 12). Petitioner thereupon requested a hearing (R. 27), and in connection therewith he submitted a further statement outlining his views on the nature of God.[2]

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[2] "All real living is meeting—Martin Buber.

"I have this God inside of me. To be truthful, I don't know if it's a long or short God or even a Superior God (much less a Supreme Being) and I have no idea what its sex is. I'm even worried about calling it God. After all a great deal of death has been done in the name of God.

At the hearing petitioner told the board that "he did not belong to any church or religion," and that "he has been influenced by books he has read and has formed his own personal reasons for opposing war" (R. 32). Following the hearing, the board affirmed petitioner's classification (R. 12), and petitioner's file was forwarded to the Selective Service Appeal Board (R. 34), which "tentatively determined that the registrant should not be classified in Class I–O or in a lower class" (R. 12).

After a hearing before a Department of Justice hearing officer (R. 40), prior to which petitioner had submitted further statements explaining the nature of his beliefs concerning war (R. 57–60), the Department of Justice recommended that petitioner's claim not be sustained (R. 42). The basis of the officer's finding was that petitioner "evidenced neither religious training and belief nor belief in a Supreme Being as defined in the Military Training and Service Act" (R. 42).

On November 17, 1960, after affording petitioner an opportunity to respond to this recommendation (R. 61–73), the appeal board voted 5 to 0 to continue petitioner's 1–A classification (R. 78). Thereafter, petitioner was ordered to report for a pre-induction

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"This God, this God I have inside of me goes off every once in a while and opens me to the motions, to beauty and sadness in the universe. That is, now and again I feel the compulsion to meet the world around me. I'm filled with wonder, I'm possessed as it were, I feel so good I think I'm crazy. So my God isn't beyond me, it's within me and opens me to Godliness in the word.

"I see an army over this world of wonder. Such stupidity and wasted energy. It's liable to kill us all." (R. 31)

physical examination (R. 84). He did not report, informing the local board by mail that he would not do so in accordance with his "previously stated views and beliefs as a conscientious objector" (R. 82), and again enclosing the poetic fragment attached to his first classification questionnaire (R. 83, 84).

On October 13, 1961, petitioner was ordered to report for induction as a delinquent (R. 87). On the advice of counsel, he reported at the induction center but refused to be processed for induction (R. 89–91).

At his trial petitioner explained the basis for his claim as a conscientious objector as follows (Tr. 28):

> I think that my actions are probably motivated most thoroughly by a feeling of relationship and love towards other human beings and other living objects in the world, and in seeing these other living objects. I can narrow it down closer; I can define it as a belief in the mystery of the heart of them, the essence being alive, and my respecting and loving this livingness in other objects and human beings * * * I suppose you could call that a belief in the Supreme Being or God. These just do not happen to be the words I use.

He said he had acquired these beliefs, "through my reading, association with other people, and living in the world," and that his reading had included Eastern philosophies, Confucius, Buddhist teachings, Christian mystics, Ralph Waldo Emerson, Whitman, Thoreau, and others (Tr. 26). The district court found petitioner guilty (Tr. 35).

On appeal from his conviction, petitioner did not question the constitutionality of Section 6(j). He

contended that he came within the statutory definition of a conscientious objector. The court of appeals found "there was ample basis" (Pet. App. 9) for the determination of the local and appeal boards that petitioner's beliefs did not meet the statutory standards fixed by Section 6(j), and it affirmed the conviction.

DISCUSSION

1. In *United States* v. *Seeger,* No. 936, this Term, we are seeking review of a decision by the Second Circuit that the statutory requirement of belief in a Supreme Being, as a condition for exemption from military service as a conscientious objector, discriminates among religious beliefs in violation of the Fifth Amendment. Since the constitutionality of this provision was firmly established in the Ninth Circuit before this case arose (see authorities cited in our *Seeger* petition, at p. 8), it was not a litigated issue in the present case. However, the court of appeals' ruling that petitioner did not qualify as a conscientious objector because, *inter alia,* he had expressed no unequivocal belief in a Supreme Being presupposed the constitutionality of the challenged requirement.

That the Ninth Circuit might have ruled differently on the question of statutory application had it shared the Second Circuit's doubts regarding the constitutionality of the provision is indicated by the Second Circuit's decision in *United States* v. *Jakobson,* No. 937, this Term, in which we are also petitioning for certiorari. The *Jakobson* case involved a registrant whose views were substantially similar to those held by petitioner in this case. In order to avoid

constitutional doubts in the application of the statute, the Second Circuit construed Section 6(j) as to grant conscientious objector treatment to the registrant in *Jakobson* despite the uncommon nature of his belief in a Supreme Being and notwithstanding the absence of any "duties superior to those arising from any human relation" in his creed. In our view the problems of statutory construction posed by this case and by *Jakobson* are so interrelated with the constitutional issue presented by the *Seeger* decision that all three cases merit this Court's consideration.

2. The petition for a writ of certiorari also raises the question whether petitioner failed to exhaust his administrative remedies. This question was briefed by both sides in the court of appeals, but it was not reached by that court in view of its holding that petitioner did not qualify as a conscientious objector. The issue arises because petitioner apparently failed to submit to a physical examination at the induction center and previously refused to report for a pre-induction physical. The record is ambiguous, however, as to exactly what transpired at the center in connection with the examination.[3] In view of this ambiguity, the government does not intend to argue

[3] The Report of Medical Examination (R. 94–97) contains a few entries, presumably relating to petitioner's physical condition. The date originally set for petitioner's pre-induction physical examination—August 30, 1961—is crossed out on the Report and also on the accompanying Report of Medical History, and the date of induction—November 22—is substituted. Also, the word "INDUCTEE" is stamped over the notation "PIP",

in this case that petitioner failed to exhaust his administrative remedies.

CONCLUSION

For the reasons stated, the government concurs in the request that the petition for a writ of certiorari be granted on the first two questions presented by the petition if certiorari is granted in *United States* v. *Seeger*, No. 936, this Term.

Respectfully submitted.

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MARCH 1964.

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under the heading "Purpose of Examination" on both Reports.

Petitioner's Record of Induction (R. 92, 93) also contains an entry relating to medical data (R. 92).

After petitioner's file had been sent to the United States Attorney in San Francisco for prosecution (R. 91), petitioner wrote letters, on the advice of counsel, to his local board, the California State Headquarters, and General Hershey, requesting a physical examination, explicitly for the purpose of exhausting his administrative remedies (Ex. 2, 107, 112). These requests were denied (Ex. 2, 111, 114).

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